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In The Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Petitioners,

v.

ZIYA K. KORAY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE*, THE USC LAW CENTER'S POST-CONVICTION JUSTICE PROJECT, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Both the petitioner and the respondent have consented to the participation of *amicus curiae* in this case. Their letters of consent are on file with this Court.

The Post-Conviction Justice Project is a clinical program at the University of Southern California Law Center. Since 1981, students and faculty in the Project have provided legal assistance to federal inmates. The Project affords these services primarily to inmates incarcerated at the Federal Correctional Institution at Terminal Island, California, pursuant to a contract with the Federal

Bureau of Prisons.[1]

The Project is greatly concerned that inmates may improperly be denied credit for time spent in forced residence at community corrections centers[2] prior to sentencing. Students in the Project have argued (under faculty supervision) several court of appeals cases addressing the issue that is now before this Court. *See Mills v. Taylor*, 967 F.2d 1397 (9th Cir. 1992); *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990). Because of the importance of this issue to clients represented by the Project, and because of their familiarity with the internal operations of the Federal Bureau of Prisons, faculty and students in the Project offer their assistance to this Court.

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[1]The University of Southern California's Project is only one of several law school clinical programs that assist inmates. For many years, the Jerome N. Frank Legal Services Organization at the Yale Law School has represented inmates at the Federal Correctional Institution at Danbury, Connecticut. Similarly, the Kansas Defender Project at the University of Kansas School of Law has long assisted inmates incarcerated at the Federal Penitentiary at Leavenworth, Kansas. The relationship between these legal aid programs and the Bureau of Prisons is discussed in 28 C.F.R. § 543.15 (1994).

[2]Over time, the term for these facilities has changed. Originally called "halfway houses," these facilities have more recently been called "community treatment centers" or "community corrections centers." *See, e.g.*, 18 U.S.C. § 4082(c) (1988) (a "facility," where an inmates may be confined, includes a "community treatment center"); Bureau of Prisons Program Statement 5880.28 (July 29, 1994) [reprinted in part at Pet. App. 46a] (denying sentence credit for time "in residence in a community corrections center"); Bureau of Prisons Program Statement 7310.02 (Oct. 19, 1993) [reprinted in part in the Appendix to this brief at App. 1a] (entitled "Community Corrections Center (CCC) Utilization and Transfer Procedure"). Though the terms are interchangeable, this brief will adopt "community corrections center" because it is the term currently used by the Bureau of Prisons.

STATEMENT OF THE CASE

On April 23, 1991, respondent Ziya K. Koray was arrested on federal criminal charges brought in the District of Maryland.[3] Petition Appendix ("Pet. App.") 2a. On June 25, 1991, after the entry of his guilty plea but prior to sentencing, the district court ordered Mr. Koray into the custody of the Pretrial Services Agency. *Id.* The court also ordered that Mr. Koray be held at a community corrections center operated by the Volunteers of America in Baltimore. J.A. 9-15. As required by the district court, Mr. Koray was confined at the center for twenty-four hours a day; he could not leave for any reason unless accompanied by an agent. *Id.*; Pet. App. 2a, 25-26a. Mr. Koray remained incarcerated at the center until he reported for the service of his sentence. Pet. App. 2a. Mr. Koray left the community corrections center only once during the entire time he was held there. Pet. App. 19a-20a.

The Bureau of Prisons denied Mr. Koray sentence credit for the time he was confined at the community corrections center. Pet. App. 2a. Mr. Koray subsequently brought a habeas corpus petition to challenge that decision. The district court denied relief, *id.*, but the court of appeals reversed and remanded. The court of appeals found that confinement in a community corrections center is "official detention" within the meaning of 18 U.S.C. § 3585(b) (1988). Pet. App. 14a-24a. The court found it "difficult to view Koray's detention as other than 'official' since he was put in the 'custody' of pretrial services . . ., and was confined to the [community corrections center] by court order." Pet. App. 14a. The Bureau of Prisons now challenges this decision.

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[3]At the time, the Bureau of Prisons did not operate a jail or other institution in that district. *See* Federal Bureau of Prisons, U.S. Department of Justice, Facilities 1991 (describing the Bureau's institutions). Prior to his incarceration at the Volunteers of America facility, Mr. Koray was therefore confined at a county jail in Rockville, Maryland and he received credit for that period. J.A. 25, 27, 29, 31.

SUMMARY OF ARGUMENT

Section 3585(b) of Title 18 commands the Federal Bureau of Prisons to grant credit for time spent in "official detention" prior to sentencing. According to the Bureau, "official detention" occurs only when a defendant is denied bail under the Bail Reform Act of 1984, 18 U.S.C. sections 3141, *et seq.* (1988 & Supp. V 1993). Brief for the United States ("Pet. Br.") 10. This narrow and formalistic interpretation must fail.

First and foremost, the Bureau's construction of section 3585 is contrary to the statute's plain meaning, conflicts with other statutes and is unreasonable. The ordinary meaning of "detention" includes forced residence in a community corrections center. In her brief, petitioner Reno seeks to counter the plain meaning by arguing that Congress did not conceive of placement in a community corrections center as "imprisonment." Pet. Br. 14. Petitioner claims that "related statutes make clear that a sentence of imprisonment may be served only in a 'penal or correctional facility'" where the prisoner is subject to federal or state control. Pet. Br. 7. If petitioner Reno is implying that a sentence of imprisonment may not be served in a community corrections center, her claim is false. By statute, a community treatment center is a "penal or correctional facility," and federal prisoners regularly serve time in these facilities.

In 1965, Congress authorized the Bureau of Prisons to place inmates in community corrections centers *during* their sentences of imprisonment. In 1984, Congress enacted another law to encourage the Bureau to continue to place sentenced prisoners in these centers. In her brief, the petitioner has overlooked these statutes. Petitioner Reno has also not mentioned the thousands upon thousands of prisoners who are, at this very moment, committed to the Bureau's care for service of a sentence of imprisonment, and who have been sent by the Bureau to community corrections centers to serve their sentences. In May 1993, for example, *8,200 federal inmates* were then serving their

sentences of imprisonment in community corrections centers. In May 1994, *9,000 federal inmates* were in such centers. About half of these centers are privately-run contract facilities, just like that operated by the Volunteers of America. Federal prisoners are held in these community corrections centers under the same conditions as people like Mr. Koray. These prisoners receive sentence credit because both the Congress and the Bureau of Prisons consider confinement in community corrections centers to be part of a term of imprisonment. Thus, the petitioner's construction of the statute — which would grant sentence credit to these prisoners but deny credit to presentence detainees like Mr. Koray — is contrary to the plain meaning of "official detention," is counter to other federal statutes, and is unreasonable. Credit must be given whenever presentence defendants are held in these centers, as held by the court of appeals in *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992).

Second, this Court must construe section 3585 to avoid serious constitutional problems. Congress did not plainly require this Court to interpret section 3585 in the manner urged by the petitioner. A construction of the statute that grants sentence credit to prisoners in community corrections centers and to anyone detained anywhere by any order of a state court, but denies credit to presentence detainees in community corrections centers, would violate equal protection.

Third, contrary to the petitioner's claims, the Bureau of Prisons can easily administer a rule granting credit for forced residence in a community corrections center. In the overwhelming number of cases, the credit determination will be made from an examination of the presentence report and district court orders. These materials are readily available to the Bureau. Further, given its extensive practice of placing sentenced prisoners in contract community treatment centers, the Bureau has considerable contacts at those centers and a vast amount of information about them.

ARGUMENT

I. The Bureau of Prisons' Construction of Section 3585, Which Denies Sentence Credit to Presentence Detainees Who Are Held in Community Corrections Centers Under the Same Conditions As Sentenced Federal Prisoners, Is Contrary to the Plain Meaning of the Statute, Conflicts With Other Laws, and Is Unreasonable.

A. Community corrections centers are "penal or correctional facilities," and the Bureau of Prisons regularly places inmates in these centers to serve their sentences of imprisonment.

For thirty years, the Bureau of Prisons has exercised its statutory authority to place inmates in community corrections centers during their sentences of imprisonment. The petitioner is flatly wrong in suggesting that sentences of imprisonment cannot be served in these centers.

The Bureau of Prisons was first given statutory authority to place sentenced prisoners in community corrections centers in 1965. The 1965 law provided that people convicted of federal crimes were to be committed to the custody of the Attorney General for service of their sentences. Act of September 10, 1965, § 1, 79 Stat. 674 (previously codified at 18 U.S.C.A. § 4082(a) (West 1969)). Further, "[t]he Attorney General may designate as a place of confinement any available, suitable and appropriate institution or facility, whether maintained by the Federal government or otherwise . . .." *Id.* (previously codified at 18 U.S.C.A. § 4082(b) (West 1969)). Most significantly, Congress specified that "the term 'facility' shall include a residential treatment center." *Id.* (previously codified at 18 U.S.C.A. § 4082(f) (West 1969)).

The purpose and effect of this law was clear to Congress

and to the Administration. The statute was enacted at the request of the Attorney General, Nicholas DeB. Katzenbach. In his letter to the Senate, Katzenback wrote that "[t]his proposed legislation would expressly authorize the Attorney General to commit or transfer prisoners to residential community treatment centers." S. Rep. No. 613, 89th Cong., 1st Sess. (1965) (letter from Nicholas DeB. Katzenbach to the Vice-President (Mar. 29, 1965)), *reprinted in* 1965 U.S. Code Cong. & Admin. News 3076, 3081. The "Purpose" section of the Senate Report states that the bill's basic provisions, "authorizing the use of residential community treatment centers . . ., would get prisoners started in law-abiding careers *before* they are released from their terms of imprisonment." *Id.* at 3076 (emphasis added).

Congress subsequently passed the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, which revised the federal criminal code. Under the Act, a person who is sentenced to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." *Id.*, § 212(a)(2), 98 Stat. 2007 (codified at 18 U.S.C. § 3621(a) (1988)). The Bureau "may designate any available penal or correctional facility" for service of that sentence, "whether maintained by the Federal Government or otherwise." *Id.* (codified, as amended, at 18 U.S.C. § 3621(b) (1988 & Supp. V 1993)). In the Act, Congress retained the provision that "facility" includes a "residential community treatment [corrections] center." *Id.*, § 218(a)(3), 98 Stat. 2027 (codified at 18 U.S.C. § 4082(c) (1988)).

These provisions demonstrate that, in passing the Comprehensive Crime Control Act (which also contained section 3585(b)),[4] Congress continued to consider placement in a community corrections center to be an ordinary part of a sentence

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[4]Section 3585 was also passed as part of the Act. *Id.*, § 212(a)(2), 98 Stat. 2001.

of imprisonment. But Congress did more than merely reorganize the prior statute. In the Act, Congress added a completely new provision: "[t]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part . . . under conditions that will afford the prisoner a reasonable opportunity . . . to prepare for his re-entry into the community." *Id.*, § 212(a)(2), 98 Stat. 2009 (codified, as amended, at 18 U.S.C. § 3624(c) (1988 & Supp. V 1993)). The Act thus demonstrates not only Congress' awareness that inmates would serve sentences in community corrections centers, but that Congress *encouraged* such placements. There can be no other reasonable interpretation of sections 3621(b) and 3624(c).

The Bureau of Prisons' own Program Statements and practices irrefutably confirm this interpretation. Program Statement 7310.02 is reprinted in part in the Appendix ("App.") to this brief. It gives the Bureau's "operational philosophy" for placement of inmates in a community corrections center ("CCC"): "whenever possible, eligible inmates are to be released to the community through a CCC." Program Statement 7310.02 (Oct. 19, 1993), *infra*, at App. 1a. As the Bureau explains,

> CCCs provide an excellent transitional environment for inmates *nearing the end of their sentences*. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

Id. (emphasis added).[5] The same Program Statement reprints

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[5]Another portion of the same Program Statement states:

> CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored.

(continued...)

section 3621(b), which gives the Bureau the ability to designate "any available penal or correctional facility" for service of a sentence of imprisonment. *Id.*, *infra*, at App. 2a. After quoting the statute, the Program Statement explains that "[a] CCC meets the definition of a 'penal or correctional facility.'" *Id.*

Pursuant to the authorizing statute and the Bureau's Program Statement, tens of thousands of federal inmates serve portions of their sentences in community corrections centers every year. On May 12, 1993, the Director of the Federal Bureau of Prisons, Kathleen M. Hawk, testifed before Congress about federal prison population trends. She told Congress that there were then over 76,000 inmates in federal prison facilities and another 8,200 in contract facilities. Federal Prison Population; Present and Future Trends: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the Comm. on the Judiciary, House of Representatives, 103d Cong., 1st Sess. 7 (1993) (testimony of Kathleen M. Hawk). In response to questioning by members of Congress, Director Hawk described the Bureau's extensive use of private contract facilities, such as the Volunteers of America community corrections center:

> MR. COBLE. Now most of these [8,200] contract inmates, I presume, are housed in

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[5](...continued)
Id., *infra*, at App. 3a. As reported by the Federal Judicial Center, "[t]he Bureau of Prisons maintains a network of contractor-operated halfway houses — community treatment centers (CTCs) — principally for offenders who are approaching the ends of their terms of imprisonment." James B. Eaglin, Federal Judicial Center, Sentencing Federal Offenders for Crimes Committed Before November 1, 1987, at 7 (1991 ed.). The same publication notes that while section 3624(c) applies "specifically to persons who committed offenses after November 1, 1987, the Bureau utilizes its existing CTCs and various prerelease programs to achieve [the same] goal" for all inmates. *Id.* at 8.

> facilities operated by municipalities and/or counties. Would that be a valid conclusion?
>
> MS. HAWK. Roughly half are community corrections facilities that are not operated by municipalities at all. Most of that half are either private or nonprofit. The other half are run through intergovernmental agreements with municipalities, although they then contract out much of the services to private vendors.

Id. at 48. Director Hawk also testified that the average length of time that a federal inmate spends in a community corrections center prior to his or her release is 123 days. *Id.* With these figures, one may estimate that each year tens of thousands of federal prisoners serve portions of their terms of imprisonment in community corrections centers, prior to their release. And the numbers are, if anything, increasing. In May 1994, Director Hawk told Congress that the total population of Bureau facilities was then 84,000 inmates, but "[w]e have another 9,000 that are in contract facilities or halfway houses." Prison Inmate Training and Rehabilitation Act of 1993: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the Comm. on the Judiciary, House of Representatives, 103d Cong., 2d Sess. 52 (1994) (testimony of Kathleen M. Hawk).

In sum, the petitioner is simply incorrect in suggesting that confinement in a community corrections center may never be imprisonment.[6] Congress has determined that a community

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[6]The government has argued, in other contexts, that a sentence of "imprisonment" includes both prison time and "community confinement." In *United States v. Strozier*, 940 F.2d 985, 988 (6th Cir. 1991), the court accepted the government's argument that a sentence of seven months in prison and seven months of community confinement, amounted to a total sentence of more than one year of imprisonment. With a sentence of

(continued...)

corrections center is a "penal or correctional facility." Every year, the Bureau holds thousands upon thousands of prisoners in community corrections centers, just like the center where Mr. Koray was confined. All of these prisoners earn credit towards their sentences of imprisonment, pursuant to Congress' command.

B. The Bureau of Prisons' interpretation of section 3585 conflicts with the statute's plain meaning and other laws, and is unreasonable.

"Official detention" is not defined in the statute. Nor is the term expressly linked to "orders of detention" under the Bail Reform Act of 1984; section 3585 does not cite to the detention provisions of that Act. The heading of section 3585(b) is "Credit for prior *Custody*." (Emphasis added). The predecessor statute to 3585(b), former 18 U.S.C. § 3568, gave sentence credit for days spent "*in custody* in connection with the offense." This Court has rightfully noted that the title of a section can aid in determining the meaning of its text. *See INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). Given that the language of the prior statute is repeated in the heading of the new statute, given the lack of a specific reference in section 3585(b) to the Bail Reform Act, and given Congress' understanding that time in a community corrections center forms part of a sentence of imprisonment, Congress could not have intended that "official detention" means only time in custody of prison officials pursuant to a federal order of detention. Indeed, when section 3585(b) was enacted, the Bureau of Prisons did not take "official detention" to mean only detention under the Bail Reform Act. In 1989, the General Counsel of the Bureau issued an "Operations Memorandum" that simply defined "official detention" as "custody." *See* Bureau of

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[6](...continued)
imprisonment of more than one year, the district court was required to impose a term of supervised release. *Id.*

Prisons Operations Memorandum from General Counsel Clair A. Cripe (October 23, 1989), *reprinted infra*, at App. 9a ("Under section 3585(b), an inmate will receive jail credit on the federal sentence, for time spent in pre-sentence custody in connection with the federal offense.").[7] The Operations Memorandum did not link "official detention" with detention under the Bail Reform Act.

When a term is not defined in a statute, it is given its ordinary or natural meaning. *Asgrow Seed Co. v. Winterboer*, 115 S.Ct. 788, 793 (1995); *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1603 (1994); *Russello v. United States*, 464 U.S. 16, 21 (1983). "Detention" is defined as "a holding in custody," or "a period of temporary custody prior to disposition by a court." Webster's Third New International Dictionary 616 (1986). It may also be termed a "[k]eeping in custody or confinement; arrest." IV Oxford English Dictionary 545 (2d ed. 1989). The ordinary meaning of "detention" must include forced residence in a community corrections center.[8] Confinement in a community corrections center must also be deemed "official" when it is required by a federal court. Pursuant to section 3621(a), the district courts commit defendants to the custody of the Bureau of

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[7]The Operations Memorandum was filed by the United States as part of the record in *Mills v. Taylor*, C.A. No. 91-55362 (9th Cir. 1992).

[8]*See Moreland v. United States*, 968 F.2d 655, 664 (8th Cir.) (en banc) (Heaney, J., dissenting) (finding that that the ordinary meaning of "official detention" includes custody at a community corrections center), *cert. denied*, 113 S.Ct. 675 (1992); *Mills v. Taylor*, 967 F.2d 1397, 1401 (9th Cir. 1992) (quoting *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) and finding that confinement in a community corrections center falls within the plain meaning and obvious intent of "official detention"); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989) (noting that "[t]o a normal English speaker, even to a legal English speaker, being forced to live in a halfway house is to be held 'in custody'").

Prisons for service of their sentences of imprisonment. Surely the Bureau considers these commitment orders "official." Orders that send defendants to community corrections centers are not made "unofficial" because of the destination of the defendants. Thus, the Bureau's definition of "official detention" conflicts with the plain meaning of the term.

Moreover, even if the term "official detention" is not given its ordinary meaning, but is interpreted solely by reference to other statutes, as the petitioner urges, it includes forced residence in a community corrections center. The petitioner argues that the term ought to be construed by reference to sections 3585(a) and 3621(b), and hence "credit for time 'spent in official detention' under Section 3585(b) is available only to a defendant who [is] detained in a 'penal or correctional facility,' 18 U.S.C. 3621(b), and [is] subject to the control of state or federal penal authorities." Pet. Br. 13; *see also* Pet. App. 45a-46a. But, as we have seen, Congress has specifically included a community corrections center within the definition of a "penal or correctional facility." And the petitioner's requirement that the facility be subject to the control of "state or federal penal authorities" appears nowhere in the statutes. Section 3621(b) says that the facility may be "maintained by the federal Government *or otherwise*." 18 U.S.C. § 3621(b) (1988 & Supp. V 1993) (emphasis added). As the above discussion has demonstrated, both Congress and the Bureau of Prisons agree that sentences of imprisonment may be served in private contract facilities, which are not maintained by federal or state penal authorities. Hence, a study of the surrounding statutes shows that "official detention" includes time in custody in a contract community corrections center.

The Bureau's current interpretation of section 3585 also contradicts any direct linkage to detention orders issued by the federal courts pursuant to the Bail Reform Act. For example, as the petitioner concedes, the Bureau grants credit when a defendant is in the custody of state officials prior to being brought to federal court. *See* Pet. Br. 11. Such a defendant has not been detained

pursuant to a federal detention order. The Bureau also grants credit for the period following a federal defendant's arrest and prior to the entry of an order governing detention or release. *See, e.g.*, Bureau of Prisons Program Statement 5880.28 (Sentence Computation Manual) (Feb. 21, 1992 & July 29, 1994), at 1-17 to 1-19, 1-24A (giving examples of sentence computation; all the examples begin federal detention credit at the time of arrest, and not at the date of entry of a court order of detention). The Bureau considers such a defendant to be in "official detention" even though he or she has not yet been to court and no detention order has yet issued.

The term "official detention" is not defined in section 3585(b) and the ordinary meaning of the term unambiguously includes forced residence at a community corrections center. Nevertheless, if this Court considers the term to be ambiguous, the petitioner's construction ought to be rejected because it is unreasonable. A court construing an ambiguous statute may consider the "[j]udicial perception that a particular result would be unreasonable." *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987) (per curiam); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) (absurd results are to be avoided). Under the Bureau's construction of section 3585(b), people held in state custody, under an unknown set of conditions, receive credit. And, as already explained, federal inmates receive sentence credit when they are sent by the Bureau to these very same centers. Perhaps most remarkably, the Bureau has even reserved to itself the power to place pretrial detainees in community corrections centers, *and to grant them sentence credit*. In Program Statement 5880.28, Pet. App. 46a, the Bureau considers a person to be in "official detention" when a court has entered an order of detention *and the Bureau places that person in a center*. There is no valid reason for this disparate treatment.

The only justification given by the Bureau for denial of credit is that people put in community corrections centers by the Bureau may be removed at the discretion of the Attorney General

and they may be prosecuted for escape if they leave the centers. *See* Program Statement 5880.28, Pet. App. 46a. This is not a sufficient reason to justify the denial of credit. As Judge Heaney wrote for the five dissenters in *United States v. Moreland*, "I do not see how a delineation of the paths by which people become residents or a recitation of official goals and reasons leading to their residential status can adequately serve as a rational basis for differing treatment." *United States v. Moreland*, 968 F.2d 655, 666 (8th Cir.) (en banc) (Heaney, J., dissenting), *cert. denied*, 113 S.Ct. 675 (1992).[9]

Presentence defendants who are confined in these centers pursuant to a court order may be removed from the centers at the court's discretion. The court "may at any time amend the order to impose additional or different conditions of release." 18 U.S.C. § 3142(c)(3) (1988 & Supp. V 1993). Further, a person who violates a condition of a release order "is subject to a revocation of release, an order of detention, and a prosecution for contempt of court." 18 U.S.C. § 3148(a) (1988); *see also* 18 U.S.C. § 3148(c) (1988) ("The judicial officer may commence a prosecution for contempt, under section 401 of this title, if the person has violated a condition of release"). Such a prosecution would be for criminal and not civil contempt, because it would be punishment for the past violation, as opposed to an attempt to force future compliance with a court order. *See United States v. Dixon*, 113 S.Ct. 2849, 2855-2856 (1993) (Double Jeopardy Clause attaches when defendants are convicted of criminal contempt for violation of pretrial release orders under District of Columbia statutes); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 443 (1986) (criminal contempt sanctions are punitive and are imposed to vindicate the court's authority). Criminal contempt "is a crime in every fundamental

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[9]*See also Johnson v. Smith*, 696 F.2d 1334, 1337-1340 (11th Cir. 1983) (finding that the denial of credit violated equal protection under former 18 U.S.C. § 3568, the predecessor statute, where the government offered no reason to support the difference in treatment).

respect." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). Moreover, in addition to the public approbation visited on all those who violate our criminal laws, the federal contempt statute authorizes the imposition of a "lasting" imprisonment. *See* 18 U.S.C. § 401 (1988) (federal court may punish contempt "by fine or imprisonment"); *United States v. Barnett*, 376 U.S. 681, 694 (1963) (reviewing criminal contempt authority, and noting that the cases permit the imposition of even "'an oppressive fine, or lasting imprisonment'"; citation omitted).[10]

Nor may the Bureau's reading of section 3585(b) be justified by the conditions under which presentence defendants are confined in community corrections centers. The petitioner has expressly abandoned any sort of functional analysis of detention. *See* Pet. Br. 23. Moreover, the petitioner would lose under any such functional analysis. The conditions under which presentence defendants are held in community corrections centers are at least as restrictive as those applied to sentenced inmates in the same facilities. For example, Mr. Koray was held in the community corrections center for twenty-four hours each day. By comparison, the stay of sentenced prisoners ordinarily consists of several stages. When sentenced prisoners are initially designated to community corrections centers, they are generally restricted to the centers except for employment or structured activities. *See* Program Statement 7310.02, *infra*, at App. 3a. That period normally lasts two weeks. After that, inmates are granted greater access to the community through weekend and evening passes. *Id., infra,* at App. 3a-4a. Finally, inmates may be permitted to live at home "while continuing in official detention status." *Id., infra,* at App. 4a. Mr. Koray's confinement was at least as restrictive as the first stage of inmates' imprisonment at community corrections centers, and it was much more restrictive than the second and third stages

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[10]It is also worth noting that a person who is in the "official detention" of state authorities is subject neither to the Attorney General's discretion nor to a federal prosecution for escape. Yet that person may receive credit against a federal sentence.

of those imprisonments.

The petitioner's interpretation of section 3585(b) thus conflicts with the plain meaning of the statute, with other statutes, and is unreasonable. It should not be sustained by this Court.

C. There is no reason to defer to the Bureau of Prisons' interpretation of section 3585.

The petitioner argues that this Court should defer to the Bureau of Prisons' construction of section 3585, as the Bureau is the agency charged with admininstering the statute. Pet. Br. 21-28. The Bureau of Prisons does have the duty to administer section 3585 and to compute sentence credit for time spent in "official detention." *United States v. Wilson*, 112 S.Ct. 1351, 1354-55 (1992). Nevertheless, the petitioner's argument should be rejected. No deference is owed on pure questions of statutory construction. Further, this Court ought not defer to the Bureau's inexpert, unpublished and unreasonable construction of section 3585.

There is no deference to an agency on pure questions of statutory construction. Such questions are for the courts to decide. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Whether Congress intended the term "official detention" to be an express reference to the Bail Reform Act is a pure question of statutory construction. In assessing whether section 3585(b) contains an express reference to another statute, the Bureau is not acting to fill in a gap left by Congress. The Bureau has not promulgated any sort of legislative rule to decide what ought to constitute "official detention." In Program Statement 5880.28, Pet. App. 45a-46a, the Bureau has merely asserted its belief that "official detention" refers to detention under the Bail Reform Act. In this respect, this case is just like *Cardoza-Fonseca*. There this Court held that the question whether two statutory standards were identical was a pure question of statutory construction, and no deference was owed to the agency's interpretation. *Id.* at 448. *See also Federal Election*

Comm'n v. NRA Political Victory Fund, 115 S.Ct. 537, 543 (1994) ("we do not think that the [statutes], authorizing the FEC to litigate in federal courts, are the sort of provisions which can be said to be within the province of the agency to interpret."). Because the Bureau is in no better position than this Court to resolve a pure question of statutory construction, no deference is owed. The statute ought to be given its ordinary meaning, which includes forced residence in a community corrections center.

If this Court determines, however, that the issue is not a pure question of statutory construction, there is still no reason to defer to the agency. There is no deference to an administrative construction if the intent of Congress is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Given that Congress has defined a community corrections center to be a "penal or correctional facility," and given the ordinary meaning of the term "official detention," there is no ambiguity here. Congress clearly intended "official detention" to include forced residence in a community corrections center. There is no deference where, as here, an agency's construction is contrary to the plain language of a statute, *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991), or where it "goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 114 S.Ct. 2223, 2231 (1994).

Nor is this the sort of instance where policy favors deference to the executive. In *Chevron*, this Court detailed some of the reasons why deference may be appropriate. The regulatory scheme may be "technical and complex," the agency may have considered the manner "in a detailed and reasoned fashion," and the agency's decision may involve "reconciling conflicting policies." *Id.* at 865 (footnotes omitted). None of these reasons are advanced by deference here.

First, the regulatory scheme is neither technical nor complex. What constitutes "official detention" is primarily a legal

and not a technical question. And in applying the legal definition to individual cases, the Bureau will review the *court orders* that confine people in community corrections centers. Surely the federal courts need not defer to an agency's application of a statute to a *court order*. The Bureau cannot possibly claim that it is better able than a court to assess the meaning of a court order.

Second, the Bureau has not considered section 3585(b) in a "detailed and reasoned fashion." The Bureau's Policy Statement is not published. It was not promulgated pursuant to the Administrative Procedures Act, 5 U.S.C. sections 551, *et seq.* (1988 & Supp. V 1993). Courts give unpublished and informal interpretations only *some* weight. *See Martin v. OSHRC*, 499 U.S. 144, 157 (1991). Moreover, the Bureau has changed its construction of the statute. When section 3585(b) was first promulgated, the Bureau simply equated "official detention" with "custody." *See* Operations Memorandum, *infra*, at App. 9a. Only recently has the Bureau, in Program Statement 5880.28, decided that "official detention" was meant by Congress to be an express reference to orders of detention under the Bail Reform Act. The Bureau's new construction of the statute was promulgated after the Bureau denied Mr. Koray sentence credit. While the Bureau is not estopped from changing its construction of the statute, a changed construction is entitled to much less deference than a consistently-held view. *Good Samaritan Hospital v. Shalala*, 113 S.Ct. 2151, 2161 (1993) (citations omitted); *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992). And the amount of deference due to an agency construction that has been promulgated during litigation presents a difficult and perhaps unresolved question for this Court. *See Estate of Cowart*, 112 S.Ct. at 2594-2595.

Third, the Bureau has not arrived at its construction after reconciling "conflicting policies." According to the petitioner, "the Bureau has now abandoned a 'functional approach' to the custody issue." Pet. Br. 23. Had the Bureau taken a discerning "functional approach," it might be said that the Program Statement

reconciled various policies about sentence credit. Instead, the Program Statement merely attempts to link "official detention" to the Bail Reform Act. All the Bureau has done is place its own spin on the language of the statute.

Finally, as already demonstrated, the Bureau's interpretation of section 3585(b) is unreasonable. No deference is owed to an unreasonable agency construction of a statute. *See Chevron U.S.A. Inc.*, 467 U.S. at 844-845; *see also Estate of Cowart*, 112 S.Ct. at 2594 (deference may be owed to "a reasonable statutory interpretation").

The petitioner's interpretation of section 3585(b) presents a pure question of statutory construction, appropriate for this Court to determine. Neither precedent nor policy require deference to the Bureau's construction of the statute.

II. This Court Should Interpret Section 3585 to Require Sentence Credit for Presentence Detainees Who Are Held in Community Corrections Centers Under the Same Conditions As Sentenced Federal Prisoners; Any Other Construction Would Raise Serious Constitutional Questions.

The petitioner's construction of section 3585 would violate equal protection. This Court should construe section 3585 to avoid raising serious constitutional questions. Interpreting the statute to grant credit for forced residence in a community corrections center would avoid any constitutional difficulties.

Whenever possible, this Court should construe a statute to avoid conflicts with the Constitution. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop Of Chicago*, 440 U.S. 490, 500 (1979); *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974). Congress is sworn to uphold the Constitution. This Court "will therefore not lightly assume that Congress

intended to infringe constitutionally protected liberties . . .." *Edward J. DeBartolo Corp., supra.* A statute will be construed to avoid serious constitutional problems unless that construction "is plainly contrary to the intent of Congress." *Id.*; *see also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989) ("we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); *Catholic Bishop Of Chicago*, 440 U.S. at 500-01 (intent of Congress must be clearly expressed).

The Due Process Clause of the Fifth Amendment essentially incorporates the provisions of the Equal Protection Clause of the Fourteenth Amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The government violates a person's right to equal protection when similarly situated parties are treated dissimilarly, absent sufficient justification. *See generally City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-442 (1985). At a minimum, the petitioner must show that the disparate treatment of presentence detainees in community corrections centers is rationally related to a legitimate governmental interest. *Id.* at 441-442. This standard is not toothless. The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

Presentence detainees in community corrections centers are similarly situated to at least two other groups: (a) sentenced federal prisoners who reside in the same centers under the same conditions; and (b) presentence defendants who are in the custody of state authorities, under whatever conditions are imposed by the state.

With respect to the first group, as already demonstrated, presentence detainees in community corrections centers are generally subject to restrictions that are at least as severe as those

imposed on federal prisoners who are held there. In addition, both are placed in the centers for reasons of public safety. Defendants may be ordered to reside in community corrections centers if such conditions would "reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B) (1988 & Supp. V 1993). Similarly, courts that sentence defendants are required to consider the need "to protect the public from further crimes." 18 U.S.C. § 3553(a)(2)(C) (1988). And, as discussed in part IB, above, presentence detainees and sentenced prisoners are both subject to new criminal sanctions if they violate the terms of an order placing them in a center or escape.

With respect to the second group, the Bureau of Prisons grants sentence credit for defendants who are in "official detention" of state officials, if the detention is in connection with the federal offense and the defendants do not receive credit against a state sentence. *See* Pet. Br. 11. Like presentence detainees in community corrections centers, defendants held in state facilities may be subjected to a variety of restrictions, some less severe and some more severe.

There is no rational reason for the difference in treatment. The same points that demonstrate that the petitioner's construction is unreasonable apply here. The Bureau's award of sentence credit to sentenced prisoners in community corrections centers shows that its interpretation of section 3585 is arbitrary and irrational. The fact that those sentenced prisoners can be prosecuted by the federal government for escape is not a rational reason for the disparate treatment. Presentence detainees who leave community corrections centers may be subjected to "lasting" imprisonment for criminal contempt. Further, presentence defendants who are detained by the state may not be prosecuted by the federal government for escape or contempt. Yet they receive sentence credit. At its heart, the only real reason the Bureau has advanced for the disparate treatment is that a court rather than the Bureau has placed the presentence detainees in community corrections centers. That cannot be a sufficient justification for the difference in sentence

credit.

This Court need not strike down section 3585 as unconstitutional. The plain language of the statute does not compel the petitioner's construction. This Court should construe the statute so that it does not violate the Constitution. Sentence credit must be provided for defendants who are ordered to reside in community corrections centers prior to trial.

III. The Bureau of Prisons Would Have No Difficulty Administering a Rule That Affords Sentence Credit for Forced Residence In Community Corrections Centers Prior to Sentencing.

Amicus curiae submits that this Court should determine that forced residence in a community corrections center is "official detention," as held by the court of appeals in *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992). If this Court so holds, the Bureau will have no difficulty administering the rule. First, the sentence credit will usually be based on the presentence investigation report prepared by the probation officer and forwarded to the Bureau of Prisons. Second, the Bureau is already familiar with conditions in community corrections centers. Third, The Bureau has already proven that it can administer this rule.

A. All of the information needed by the Bureau of Prisons to award sentence credit is contained in presentence investigation reports or in court files.

Under 18 U.S.C. § 3552(a) (1988), probation officers are directed to perform presentence investigations of all defendants and to report the results to the court. Federal Rule of Criminal Procedure 32 directs that a presentence investigation report be prepared in each case, unless the court makes a finding that a report is not necessary. Fed. R. Crim. P. 32(c)(1). The rule also contemplates that a copy of the presentence investigation report

will be forwarded to the Bureau of Prisons. Fed. R. Crim. P. 32(c)(3)(D). The presentence investigation report thus not only aids the court in determining the appropriate sentence, but it also assists the Bureau of Prisons in classifying and programming inmates, and in preparing them for release. *See* Administrative Office of the United States Courts, Division of Probation, The Presentence Investigation Report (Publication 105) 1 (1984).

A presentence investigation report is comprehensive. The probation officer is responsible for searching out all relevant facts about the defendant and presenting them in an organized, objective report. *Id.* at 3. Every report contains a face sheet, which provides an overview of significant information. *Id.* at 7. The face sheet generally includes information about the defendant's custodial status. *Id.* Moreover, under the most recent presentence manual published by the Administrative Office of the United States Courts, the probation officer is required to describe the defendant's adjustment in pretrial custody or while under pretrial supervision. *See* Administrative Office of the United States Courts, Probation and Pretrial Services Division, The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 (Publication 107) II-8, II-34 (rev. Mar. 1992). Hence, for a defendant such as Mr. Koray, who was placed in the custody of the Pretrial Services Agency, the presentence investigation report should contain details of his supervision and confinement, including his forced residence at the community corrections center. In fact, it is easier for the Bureau to learn about conditions of residence at a community corrections center than about conditions of detention in a state facility. Because a defendant held in a center will ordinarily be under the supervision of the Pretrial Services Agency, a federal agency, full information should be in the presentence report. When a person is held in state custody, the Bureau must research the conditions of confinement on its own.

If, for some reason, the Bureau finds a presentence investigation report lacking, the necessary information should be easy to gather. Information about conditions of confinement would

ordinarily appear in the district court's order placing a person in a community corrections center. Contrary to the petitioner's claim that the Bureau would be forced to base credit decisions on unverifiable information, Pet. Br. 15, the court file should provide the answers to the Bureau's questions. The petitioner has conceded that a defendant's "bail form" ordinarily accompanies an inmate after he or she is sentenced. Pet. Br. 28. The "bail form" in this case would have answered all of the Bureau's questions. It provided that Mr. Koray was to be confined for twenty-four hours a day at the community corrections center.

B. The Bureau of Prisons has an extensive network to oversee contract community corrections centers.

As discussed earlier, every year tens of thousands of federal inmates serve a portion of their sentences in community correction centers, and this number is increasing. These facilities are so regularly utilized that the Bureau of Prisons has established a Community Corrections Branch to implement its community custody program. *See* Federal Bureau of Prisons, U.S. Department of Justice, Facilities 1991, at 82. In 1991, the year that Mr. Koray was sentenced, the Bureau of Prisons maintained thirty-three Community Corrections Offices nationwide, including one in Baltimore. *Id.* at 82-83. Each Community Corrections Office is staffed with a manager who is "responsible for development, administration, and routine oversight of residential and nonresidential services provided through contractual agreements." *Id.* at 82.

The petitioner portrays community corrections centers, such as the Volunteers of America, as purely private entities. According to the petitioner, their records are not available to the Bureau as a matter of right and their information is less verifiable than information from law enforcement agencies. Pet. Br. at 15. With respect, this characterization is not accurate. Facilities such as the Volunteers of America are on contract with the Bureau of

Prisons. The Bureau oversees the services that they provide. Not only must the Bureau of Prisons have at hand full information about each of these contract facilities, but due to the nature of their relationship, the Bureau must surely be in a position to gain any needed information from them.

C. The Bureau of Prisons' ease in administering the Ninth Circuit's rule demonstrates that it has no difficulty granting credit for forced residence in community corrections centers.

The Ninth Circuit held in *Brown v. Rison*, 895 F.2d. 533 (9th Cir. 1990), that forced residence in a community corrections center is time "in custody" within the meaning of former 18 U.S.C. § 3568. In *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992), the court of appeals reached the same conclusion under § 3585(b), the successor statute to § 3568. Following these decisions, the Bureau drafted a bright-line rule:

> credit for time spent in a community treatment center as a condition of bond (including appeal bond) is considered the same as time spent in "official detention" for those sentenced in the Ninth Circuit, if they were required to spend nights in the community corrections center.

Program Statement 5880.28, Pet. App. 47a. *Amicus curiae* submits that this is an appropriate rule for implementation nationwide.

This rule comports with the plain meaning of section 3585(b), because it would award sentence credit for time spent in custody of a community corrections center. It would not raise constitutional concerns because it would afford sentence credit under the same circumstances that credit is given to sentenced federal inmates who are placed in community corrections centers.

Sentenced inmates are given credit for a day in custody even if they are permitted to leave the centers to go to work. *See* Bureau of Prisons Program Statement 5880.28 (Sentence Computation Manual) (July 29, 1994), at 1-12 ("The Bureau of Prisons calculates any part of a day in custody serving sentence as a *full day* served on the sentence . . . and any part of a day in official detention as a *full day* for prior custody time purposes"; emphases in original).

There has been no indication of any difficulty in administering this rule. The Bureau's success in implementing this rule demonstrates that the rule could easily be administered if given nationwide application.

CONCLUSION

For the reasons set forth in this brief, *amicus curiae* respectfully asks this Court to remand this case for the award of sentence credit for the period during which Mr. Koray was confined at the community corrections center.

Respectfully submitted,

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APPENDIX

A. Excerpts from Federal Bureau of Prisons Program Statement 7310.02 (October 19, 1993): "Community Corrections Center (CCC) Utilization and Transfer Procedure"

B. Federal Bureau of Prisons Operations Memorandum (October 23, 1989): "Credit for Time In Custody Under 18 U.S.C. 3585(b)"

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: CPD
NUMBER: 7310.02

DATE: October 19, 1993
SUBJECT: Community Corrections Center (CCC) Utilization and Transfer Procedure

1. PURPOSE AND SCOPE. To provide guidelines to staff regarding the effective use of Community Corrections Centers (CCCs). This Program Statement defines placement criteria, requires that staff members start the placement process in a timely manner, and defines the circumstances when inmates may refuse community corrections (CC) programs. It also establishes an operational philosophy for CCC referrals that, whenever possible, eligible inmates are to be released to the community through a CCC, unless there is some impediment as outlined herein.

CCCs provide an excellent transitional environment for inmates nearing the end of their sentences. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

One reason for referring an inmate to a CCC is to increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services reduces the likelihood of an inmate with limited resources recidivating than might be the case if the inmate makes an abrupt transition from the institution to the community. While clearly dangerous inmates should be separated from the community until completion of their sentences, other eligible inmates should generally be referred to CCCs to maximize the chances that they will successfully reintegrate into society.

* * * *

4. STATUTORY AUTHORITY. 18 U.S.C., Section 3624(c), provides:

> "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The U.S. Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody."

18 U.S.C. Section 3621(b) provides:

> "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable." A CCC meets the definition of a "penal or correctional facility."

Therefore, the Bureau is not restricted by Section 3624(c) in

designating a CCC for an inmate and may place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.

Section 3624(c), however, does restrict the Bureau in placing inmates on home confinement to the last six months or 10 percent of the sentence, whichever is less.

5. COMMUNITY-BASED PROGRAMS

a. Community Corrections Centers (CCC). CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored. All CCCs offer drug testing and counseling for alcohol and drug-related problems. During their stay, employed inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25 percent of their gross salary, not to exceed the average daily cost of their CCC placement. Failure to make subsistence payments may result in disciplinary action.

These contract facilities, located throughout the United States, provide three program components: Community Corrections, Prerelease, and Home Confinement:

(1) The Community Corrections Component is designed as the most restrictive option. Except for employment and other structured program activities, an inmate in this component is restricted to the CCC. An inmate will ordinarily be placed in the Community Corrections Component upon arrival at the CCC. This orientation period normally lasts for two weeks or until the inmate has demonstrated to CCC staff the responsibility necessary to function in the community. Based on their professional judgment, CCC staff will determine when an inmate is prepared to advance to the prerelease component.

(2) The Prerelease Component is designed to assist inmates making the transition from an institution setting to the community. These inmates have more access to the community and family members through weekend and evening passes.

(3) The Home Confinement Component is restricted to inmates who ordinarily are serving the last 10 percent of their sentences not exceeding six months. This is a selective status that is authorized discriminately according to an inmate's adjustment and needs. Inmates are permitted to reside at home and be gainfully employed while continuing in official detention status. Sub-section b.(4) below provides more detail about this program.

* * * *

6. RELEASE PLAN. Staff shall begin release planning at an inmate's first team meeting, normally the initial classification, and shall continue throughout the inmate's confinement. The following guidelines apply:

a. Planning early in an inmate's period of confinement is necessary to ensure prerelease needs are identified and appropriate prerelease programs are recommended.

b. Preliminary decisions regarding eligibility for CC programs is to be made well in advance of the last year of confinement.

c. A final and specific prerelease plan, including a decision as to CCC referral, is normally established at a team meeting no later than 11 to 13 months before an inmate's projected release date.

7. CCC CRITERIA AND REFERRAL GUIDELINES. Staff shall make recommendations for CCC placements based on assessments of inmate needs for services, public safety, and the necessity of the BOP to manage its inmate population responsibly. CCCs are a program element and are not to be used as a reward for good institutional behavior, although an inmate's institutional

adjustment may be a factor in making a referral determination.

A number of factors must be weighed to determine the length of CCC placement for inmates, including their individual needs and existing community resources. Institution staff make a recommendation for a specific placement date to the CCM office, and Community Corrections staff determine placement dates and closely monitor average lengths of stay to efficiently manage the bedspace usage. Budgetary constraints also are a key consideration and may affect average lengths of stay. CC staff shall make every effort to establish an acceptable date as close to the institution's recommended date as possible. In any event, the acceptance date shall not precede the recommended date.

The following CCC referral guidelines apply:

a. An inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief U.S. Probation Officer in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.

b. The ultimate goal is to maximize each eligible inmate's chances for successful release and a law-abiding life.

c. When an inmate has a history of escape or failure in one or more CCC programs, careful review and consideration should be given regarding the suitability of participation and the length of placement.

d. Inmates with handicaps, minor medical conditions, or disabilities may also be considered for community placement. Inmates are required to assume financial responsibility for their health care while assigned to community programs. When an inmate is unable or unwilling to bear the cost of necessary medical care, the inmate is to be denied placement.

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10. CCC REFERRAL PROCEDURES. Normally 11 to 13 months before each inmate's probable release date, the unit team shall decide whether to refer an inmate to a Community Corrections program.

a. Referral to CCM. Staff shall use the Referral Form (BPS-210 (73) Attachment B) when referring an inmate for transfer to a CCC. Information included in the Additional Information (12) and Specific Prerelease Needs (13) sections must be as specific as possible and not just reference the progress report. Attachment B contains instructions for completing the Referral Form and related materials. Signed copies of the "Conditions of Residential Community Programs" (Attachment C) must be included with all CCC referrals. The Warden is the final decision-making authority for all CCC referrals recommended by the unit team.

If the Warden approves the CCC referral, the unit team shall forward two copies of the Institutional Referral Form and appropriate attachments to the CCM. Two copies of the referral are prepared so that one may be forwarded to the CCC while the CCM retains the other for reference. The referral packet must be forwarded to the CCM at least 60 days prior to the requested placement date. However, earlier referrals are encouraged to facilitate the release process.

If the placement is for 45 days or less, and the release method by parole, a copy of correspondence directed to the U.S. Parole Commission outlining the release plan and requesting parole certificates, as well as copies of U.S. Probation's letter recommending release plan approval, must be included in the referral package.

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e. Transfer Date. When CCMs are notified of an inmate's acceptance by a CCC, a transfer date to the CCC is to be established, and the CCM will enter the SENTRY destination assignment transaction. The effective date will be the approved future transfer date.

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Kathleen M. Hawk
Director

[Attachments omitted]

OPERATIONS MEMORANDUM

DATE: OCTOBER 23, 1989

SUBJECT: CREDIT FOR TIME IN CUSTODY UNDER 18 USC 3585(B)

CANCELLATION DATE: OCTOBER 31, 1990

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I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:

PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18, USC SECTION 3585(B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585(B) CREDIT FOR PRIOR CUSTODY —

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES —

(1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR

(2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED, THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585(B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FEDERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE, AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

(1) THE STATE CHARGES ARE DISMISSED.

(2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT,

(3) STATE PROBATION IS GRANTED, OR

(4) THE STATE ORDERS THEIR SENTENCE TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585(B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
GENERAL COUNSEL